

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DOLORES LOVIN (5); MARY
ARONSON (6); RICHARD EDWARD
KOCHE (11); PHILIP JAMES BIDWELL
(12); JEFFREY A. LIGHT (14); TRACY
O'NEAL TYLER (15); PETER P.
BRAGANSA (16),

Defendant.

CASE NO. 07cr2016-IEG

Order Denying Defendant Koch and
Bragansa's Motions in Limine to
Preclude Evidence Concerning
Approval of Drug Orders by Non-
Physicians [Doc. Nos. 481 and 484]

Presently before the Court are the motions in limine of defendant Koch and defendant Bragansa to preclude evidence concerning approval of drug orders by non-physicians.¹ Following oral argument on the motion, the Court ordered the government to provide supplemental briefing regarding the admissibility and relevance of this evidence. The government has filed its supplemental response, and defendant Koch has filed a supplemental reply. Upon consideration of all the arguments, for the reasons explained below, the Court DENIES defendants' motions to preclude this evidence.

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¹ The Court has deemed that all defendants join in the motion.

Background

2 William Harrington and Todd Wurtzel (aka Sonny Gallo) recruited physicians into the
3 Affpower organization. Every time a doctor reviewed a medical questionnaire, he or she received
4 a fee from Affpower. Harrington and Wurtzel received a commission every time a doctor they
5 recruited into Affpower reviewed a prescription. The government intends to introduce evidence at
6 trial that Wurtzel approved between 300,000 and 400,000 customer orders himself by logging into
7 the Affpower system as one of the doctors he recruited, accessing the customer orders, and
8 approving them under the names of those doctors. Wurtzel, in fact, allegedly approved more than
9 half of the prescriptions which form the basis of the counts of the Superseding Indictment.
10 Defendants Koch and Bragansa move to exclude evidence that Wurtzel misappropriated the
11 identities of the physicians in order to issue the prescriptions. Defendants argue the evidence is
12 overly prejudicial and not relevant to any element of the offenses charged. Defendant Koch also
13 argues the government failed to give defendants proper notice of its evidence or theory.

Discussion

15 As an initial matter, the Court finds the government provided defendants ample notice with
16 regard to the evidence of Wurtzel's misappropriation and its relevance to the crimes charged in the
17 Superseding Indictment. The original Indictment in this case, in summarizing Affpower's order
18 approval process, alleged that “[i]n some cases, a member of the Affpower enterprise who was not
19 a medical doctor misappropriated the identity of a licensed physician, and approved customer
20 orders and issued prescriptions using that physician's name and registration.” Furthermore, in
21 June of 2008 the government produced Wurtzel's plea agreement, which included the following
22 statement in the factual proffer:

23 In addition, defendant approved between 300,000 and 400,000 customer orders
24 himself by logging into the Affpower system as either Dr. Elizabeth Concepcion,
25 Dr. Robert Sawicki, Dr. Robert Sqitiashvilli, or Dr. Lous Tsarouhas, accessing the
customer orders and approving them under the names of those doctors. In these
instances, there was no physician involvement in the Affpower approval and sale of
prescription pharmaceuticals....

Finally, the Superseding Indictment alleges that “[i]n approximately one-half of all of Affpower’s prescription pharmaceutical orders, a member of the Affpower enterprise who was not a medical doctor misappropriated the identity of a licensed physician, approved customer orders, and issued

1 ‘prescriptions’ using that physician’s name and registration.” The government provided ample
2 notice of this theory and evidence in support.

3 The Court also finds that the evidence of Wurtzel’s misappropriation of the identity of
4 physicians to approve “prescriptions” is directly relevant to the charges alleged in the indictment.
5 Evidence of Wurtzel’s approval of more than half of the prescriptions involved in the Superseding
6 Indictment, without any involvement by a physician, is highly relevant to three questions: whether
7 the “prescriptions” issued by Affpower in connection with its sales of prescription drugs were
8 valid, whether defendants committed fraud in their representations to customers about Affpower’s
9 business, and whether the drugs were distributed without a valid prescription.

10 In order to prove its charge of distribution and conspiracy to distribute controlled
11 substances in violation of 21 U.S.C. § 841 and 846, the government must demonstrate that the
12 pharmacist defendants, as well as the affiliate defendants as aiders and abettors, dispensed
13 controlled substances without a valid prescription. The government must demonstrate that the
14 prescriptions which were “issued” by Affpower physicians were not for a legitimate medical
15 purpose and were outside the usual course of a professional practice. Evidence of Wurtzel’s
16 misappropriation of the physicians’ identities, and approval of “prescriptions” with no physician
17 involvement, is certainly evidence that controlled substances were issued without a valid
18 prescription.

19 Similarly, in order to prove its charge of wire fraud, the government must demonstrate that
20 the Affpower scheme was “reasonably calculated to deceive.” United States v. Woods, 335 F3d
21 993, 1000 n.4 (9th Cir. 2003). The affiliate defendants made numerous representations on their
22 websites concerning the nature of Affpower’s physician review process, including that the
23 submitted medical questionnaires would be thoroughly reviewed by U.S. licensed physicians.
24 Evidence that Wurtzel was issuing prescriptions in the name of physicians who had no part in the
25 process tends to demonstrate the falsity of the affiliates’ representations on their websites.

26 Finally, in order to prove its charge under the Food, Drug, and Cosmetic Act (“FDCA”),
27 the government must demonstrate that the defendants knowingly dispensed, or aided and abetted
28 the dispensing of, a prescription drug without a valid prescription. The government must

1 demonstrate the prescription was not issued by a “practitioner licensed by law to administer such
2 drug.” 21 U.S.C. § 353(b)(1)(B). Again, evidence regarding Wurtzel’s actions is directly relevant
3 to the government’s burden of proof on this charge.

4 Defendants argue the evidence of Wurtzel’s misappropriation of physician identities is
5 irrelevant because there is no evidence any defendant knew of Wurtzel’s actions. Defendants
6 further argue Wurtzel’s actions were not “reasonably foreseeable overt acts” for which they may
7 be held responsible as co-conspirators. As the government points out in its supplemental briefing,
8 admission of evidence regarding Wurtzel’s misappropriation does not in any way relieve the
9 government of the burden of demonstrating each defendant had the requisite guilty knowledge
10 required by the charging statutes. The government is not required, however, to demonstrate the
11 defendants specifically knew of Wurtzel’s actions.

12 The government intends to show at trial that defendants knew the Affpower organization
13 was approving thousands of orders per day at the rate of about 98%, with only a handful of
14 supposed physicians. Based upon these facts, the jury could infer that defendants either knew or
15 were recklessly indifferent to whether the prescriptions were being issued in the usual course of
16 professional practice or for a legitimate medical purpose. The jury could also infer that defendants
17 knew the prescriptions were not being issued by a practitioner licensed by law to administer such
18 drug and that their representations about the quality of physician review were false.

19 Given the patent relevance of this evidence to the charges in the Superseding Indictment,
20 the Court cannot say that it is more prejudicial than probative under Fed. R. Evid. 403.
21 Defendants are free to argue at trial that they had no knowledge of Wurtzel’s actions and no reason
22 to know or suspect that the numerous prescriptions were being “issued” without physician review.

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Conclusion

2 For the reasons set forth herein, the Court DENIES defendant Koch and defendant
3 Bragansa's motions in limine to preclude evidence regarding approval of drug orders by non-
4 physicians.

IT IS SO ORDERED.

7 || DATED: March 18, 2009

Irma E. Gonzalez
IRMA E. GONZALEZ, Chief Judge
United States District Court